BATTLING THE BANKS

Charlie v$ Goliath

When Charlie and Loraine Kerr received a letter from a firm of Sydney solicitors in August 1990, informing them that they were acting for a company which had purchased their mortgages from the State Bank of NSW, Charlie thought it was "a pretty gutless way of trying to get rid of them."

But Charlie stood up for himself, his family, and for hundreds like him,

-and has beaten the bank to a standstill!

Charlie Kerr is a 40 year old farmer from the Riverina region of NSW living at a small village of Daysdale some 30 miles north of the Victorian border town of Corowa. He is married with a young family of four children, ages 6 to 11.

The Kerr Family and the State Bank of NSW have been at war since October 1985 when the bank issued a letter of demand on them for $358,000.

Their problems arose like many other hard-working farmers and business people - in the early 1980's - when eastern Australia experienced a disastrous run of bad seasons, which gave far less income than had been predicted. Charlie Kerr, like many other farmers during that period of time, was forced to borrow against his assets.

As farmers, Charlie and Lorraine are not only at the mercy of the weather, but also the multi-national agri-business cartels, those faceless people who virtually control all the prices farmers receive for grain, wool and livestock.

The Kerr's problem was exacerbated when cattle purchased in 1983 (using the money borrowed from the State Bank), were found to be infected with brucolosis. This meant the farm had to be quarantined. Top breeding cattle of stud quality had to be slaughtered so that the quarantine of the farm could be lifted. The Bank of course, gave the Kerr family little sympathy and refused to help with payment of huge stock and company debts.

Charlie, in desperation, tried to obtain refinancing from other sources and answered numerous advertisements made by people offering cheap loans, but with a catch. A total of nearly $5,000 was paid to various unscrupulous 'money lenders' - people who not only refused to lend Charlie the advertised money, but also refused to refund his up front payments.

Such operators abounded in the late 1980's, and preyed heavily on trusting farmers and small businessmen who were having trouble elsewhere obtaining finance. The main tactics of these money lenders involved advertising in local papers, and demanding up front fees usually about $1,000.00.

At this point, Charlie decided to let the general public know of his humiliating position, and it came as quite a shock to the local district to learn that he was in debt to the tune of nearly $1 million.

To add insult to injury, Westpac's finance arm, AGC, (who was also a creditor) repossessed a header and 4-wheel drive tractor at harvest-time in 1985.

Charlie had grown the best crop on the farm for several seasons and had just commenced harvesting, when AGC's repossession agents decided to pay a visit and take his equipment.

Charlie's wife, Lorraine was the first to encounter these bullies at the house that afternoon. At the time she was three months pregnant. The intimidation and abusive tactics employed by the repossession agents resulted in Lorraine suffering a severe haemorrhage. AGC refused to allow the machinery to remain on the farm and only allowed its return after a crop lien was signed. This took 2 weeks to happen. Meanwhile, Charlie's prime 1,000 acre crop deteriorated dramatically, and an estimated $100,000 worth of loss was incurred.

After getting their equipment back, AGC then returned in 1987, using another firm of agents. This time the agents were armed. The agents coerced Charlie into signing a voluntary surrender document. When questioned as to why the agents were carrying guns in their vehicle, they replied that is was for use, and as they were Armed Guards, they would use it if necessary. This incident received much publicity at the time. On top of all this, Charlie and Lorraine received a letter from the solicitor representing the Sate Bank of NSW, which reads as follows:

Dear Sir/Madam

I am the Solicitor for the State Bank of New South Wales the mortgagee of the premises "Kerwyn" Daysdale. I am now to take the legal action necessary to obtain vacant possession of the property at "Kerwyn" Daysdale.

You are therefore given notice that unless you quit and deliver up possession of the property within twenty one (21) days of the date hereof, [26 February 1987] steps will be taken to have you ejected according to law. I would warn you against removing or in any way interfering with fixtures or fittings on the property as the Bank is entitled to same under and by virtue of its mortgage.

The keys of the dwelling should be handed to the Manager of the Bank's Corowa Branch.

Yours faithfully,

etc etc

When Charlie and Lorraine made their unfortunate plight known via the *National Farmer* in January 1987, one of its readers, Allan Richard Jones, from Sydney, got in contact with Charlie, and offered his help.

Charlie and Allan initiated legal action against the bank in the Supreme Court of New South Wales. They lodged a statement of claim, but under the rules of the Court, they were stopped from continuing with their actions because of technicalities, such as not having a document exchange box within 3km of the Supreme Court. However, the Master of the Court allowed them 28 days in which to lodge a new statement of claim, and suggested that they seek representation by a solicitor.

Six months later at the next hearing, Charlie applied for a relief of the rules so as to allow self representation. The court saw fit to not allow this.

However, the revised Statement of Claim (reproduced on page 19) was accepted, and the result was a form of 'Mexican Standoff" until August 1990.

It is worth reading the Statement of Claim, which in essence declares that Charlie refuses to acknowledge that he had received any legal tender money of the Commonwealth of Australia. He asserts that the bank basically created the money from nothing via book entries.

"It is the duty of the Board, within the limits of its Powers to ensure that the Policy of the Bank is directed to the greatest advantage of the people of New South Wales and has due regard to the stability and balanced development of the economy of the State".

- Section 9(4) of the State Bank of NSW

You see, when an advance or a loan is made to a borrower the banks create it by an entry into a ledger. No money is withdrawn from other people's deposits like we are lead to believe. The borrowers put up a mortgage or some other valuable security and if the advance is approved an account is opened and you are allowed to draw cheques to the agreed amount. No cash or legal tender changes hands. Cash or legal tender represents about 3% of the total money supply in our economy.

The Reserve Bank Act was set up to give the Reserve Bank of Australia "Exclusive Power" to issue Australian notes and coins as legal tender. A successful claim against any other banks for issuing non-legal tender money of the Commonwealth of Australia, would have serious ramifications for the whole banking system around Australia.

During the 'standoff', Charlie and Allan printed up and distributed pamphlets and flyers everywhere. Tens of thousands of copies of the Statement of Claim made by Charlie, plus information on the credit creation rorts rampant in our banking system, made their way around Australia and overseas.

Meanwhile the State Bank of NSW decided to sell Charlie's debt to a recently incorporated company with an asset backing of only $2.00.

In Charlie's own words, "They are supposed to have paid one million dollars ($1,000,000) to the Sate Bank for our mortgages and are now claiming that because the Bank had used these mortgages as security upon which there was a debt owing, "they were entitled to the fruits of their labour" and that the debt which the Bank claims as at 19th July 1990 was $1,518,819.00. They then claimed that as new mortgagees they made a demand for repayment upon us for this amount plus interest at $613.00 per day from the 19th July,

1990, until the amount is paid."

The Credit Act 1985, Section 81(b) makes the point that "a person being a mortgagee under a mortgage relating to a regulated Contract shall not, subject to Subsection (2) assign the whole or any part of his rights as a mortgagee under the mortgagee to "a person other than a licensed credit provider or an exempt credit provider to whom he has assigned his rights under the Credit Contract".

At a Reserve Bank conference held in Sydney and Melbourne in May and June of 1990, there was advice given by the Reserve Bank on setting up Securitisation Vehicles. The following points are worthy of attention:-

(a) At the heart of Securitisation is the Sale of Loan Assets by a Bank. The originating bank often continues to administer the loans, collecting repayments, keeping the accounts, renegotiating doubtful debts etc, as if it were still the owner of the loans. Efforts must be made to distance the Bank in the eyes of the investor from the obligations backed by the Securitised Assets. Otherwise even though the bank has no legal responsibility it might face a 'moral' or commercial risk in the form of obligations to investors in the securities if the underlying loans were not repaid.

(b) The Reserve Bank's overriding objective in framing a policy on bank securitisation schemes will be to ensure that before a bank is relieved of the obligations to hold capital against securitised assets their ownership is so clearly distinct from the bank that no residual credit risk remains with the Bank.

(c) We will require that the securitisation investment vehicle not be the bank itself nor use a name that suggest a relationship with the Bank.

(d) Any ongoing financial dealing with the bank and the securitisation vehicle would need to be on a strictly arms length basis."

(e) We would not wish to see the proportion of securitised assets sold by a Bank 'but still under its administration become large relative to the Bank's remaining book of loans'.

When Charlie received the notice from the firm of Sydney solicitors (who happen to be considered one of the top legal firms in the country), a letter was enclosed from the bank, acknowledging the receipt of $1,000,000.00 from a company called Silkdale Pty Ltd. This company (Silkdale Pty Ltd) was demanding that they be paid over $1.5 million within seven days, or they would commence action for the seizing of Charlie's assets, the eviction of his family, and the sale of his farm.

Again, in Charlie's own words, "A firm of solicitors in Double Bay, Sydney were contacted, and after milking us of $10,000.00 we were given the disappointing decision that there seemed little that could be done.

Not to be outdone, I got in touch with Mrs Pat Boyd, from the Australian Borrower's Association, a consumer support group with several legal contacts. As a result of our discussions, a land mark case against Silkdale Pty Ltd now exists.

It is also very interesting to note that Silkdale Pty Ltd was incorporated on 17th May 1990, and its principal activities are listed as 'Property Management & Investment'.

Since the battle for possession for our prize asset, there have been numerous court cases, for which I have been required to travel on all-night trains or busses to Sydney for hearings, and then return home straight away.

I find it amazing that I have not seen or met our new mortgagees. I have been put in the witness box in court and humiliated before the Court by Silkdale barristers, and have even been questioned about chasing agents from Silkdale off the farm with a gun. This is incredible, because there has been no detailed inspection of the farm by Silkdale agents, nor has anyone been chased off the farm.

As a result, the local police are keeping a file on us, and they have been recommended not to issue us with a shooter's license."

When the case went to the Supreme Court of NSW on 28th January 1991, Charlie was successful in being allowed to join Silkdale Pty Ltd and the State Bank of NSW together in a cross-claim.

Then in another hearing on 14th February 1991, Silkdale was successful in getting a judgment and an order for possession of Charlie's farm.

Charlie appealed, his case was heard in October 1991. He lost the appeal.

Finally, Charlie appealed to the full bench of the Appeal Court (3 Judges). Mr John Spender QC, (ex-Shadow Attorney General for NSW) represented Charlie's case, LongLeys Co. Pty. Ltd., VS Silkdale Pty Ltd, AND WON! This decision overturned the two previous decisions, and allowed Charlie to submit his costs as well.

This was a landmark court case - its precedent, if pursued by other brave farmers, could have far reaching consequences.

The business of creating money out of thin air, via the stroke of a pen, or the punching of computer keyboards - has got to be understood and stopped.

Is it all a plot to drive independent farmers off their farms, so the land can be sold to multi-national corporations, or is it just that banks and finance companies enjoy putting the boot in?

Either way, the case of Long Leys vs Silkdale reminds us that David beat Goliath, and Charlie certainly looks as if he has beaten the banks.

GROUPS RECOMMENDED BY CHARLIE KERR TO CONTACT FOR MORE INFORMATION

- **Australian Borrowers Association**
  PO Box 93, Tottenham. NSW 2873
  (068) 937 248
- **Allan Richard Jones**
  PO Box 245, Concord West NSW 2138
- **Citizens Electoral Councils (CEC)**
  PO Box 221, Coburg Vic 3058
  Phone (03) 384 1116

IN THE SUPREME COURT OF NEW SOUTH WALES

1..... The Defendant is and was at all times a Bank within the meaning of Section 5 of the Banking Act 1959.

2..... The Plaintiff was at all times a customer of the Defendant.

3..... On or about the ..... day of ..... 19....., the Defendant through its Manager, ..., of the Defendant's Branch at ....., in the State of ....., did verbally represent to the Plaintiff that the Defendant had approved a loan to the Plaintiff for the sum of $....., in legal tender money of the Commonwealth of Australia and at an annual interest rate of .....%.

4..... The Defendant and its Manager the said ..... knew or ought to have known that the verbal representation that the Defendant would lend the Plaintiff legal tender money of the Commonwealth of Australia at an annual interest rate of .....% was false and was made with deliberate and intentional disregard for the rights of the Plaintiff.

5..... Relying on the said false representation, the Plaintiff was on or about the ..... day of ....., 19....., induced to sign a Mortgage in favour of the Defendant in respect of the property of the Plaintiff being the land contained in the Certificate of Title Volume ....., Folio ..... The said Mortgage was subsequently registered by the Defendant with the Land Titles Office as dealing number .....

6..... After the Plaintiff had signed the said Mortgage the Defendant and its Manager the said ....., did fail to lend the Plaintiff legal tender money of the Commonwealth of Australia to the full value of the said loan. For the actual legal tender money which the Defendant risked for the said loan is estimated to be no more than 20% of the face value of the said loan. The Defendant did charge an interest rate which was about 6 times greater than what was authorised in the said Mortgage, and the Defendant did so deliberately and to the detriment and damage of the Plaintiff.

7..... In carrying out the Defendant's commitment to lend to the Plaintiff legal money of the Commonwealth of Australia, the Defendant did write cheques with the intention of making a loan beyond the amount of the Defendant's customers' deposits and the Defendant's capital reserves.

8..... The said cheques which the Defendant and its officers wrote were not at the time backed by or redeemable in legal tender money of the Commonwealth of Australia for their full face value.

9..... The only consideration which the Defendant provided in respect of the said loan to the Plaintiff was a book entry demand deposit which the Defendant itself created effortlessly and at virtually no cost to the Defendant. The Defendant, in stamping its own cheque "Paid" did make a false representation as the Defendant merely transferred some book entries and never intended to redeem the said cheques in legal tender money of the Commonwealth of Australia.

10..... The Defendant and its said Manager failed to lend the Plaintiff legal tender money of the Commonwealth of Australia and instead substituted bad cheques with the intended purpose of circulating such cheques as money.

11..... By virtue of the Defendant's activities in creating an unlawful debt by passing a bad cheque, the Defendant has collected an annual interest rate estimated to be 6.25 times greater than the amount of interest to which the Plaintiff agreed in the said Mortgage in that the actual amount of legal tender of the Commonwealth of Australia risked by the Defendant was about 5% of the said loan's face value.

12..... The Plaintiff says that any loans made by the Defendant to the Plaintiff pursuant to the said agreements pleaded herein were made by the Defendant in the form of Bank Credit and not in legal tender money of the Commonwealth of Australia as represented by the Defendant. The Plaintiff says that this Bank Credit was created by the Defendant upon the Plaintiff's ability to pay back the Defendant's ability to pay back the Defendant this Credit in the form of the Plaintiff's assets which are real and the working of these assets which can be proven to exist in actuality. The Plaintiff further says that the Credit so loaned to the Plaintiff was in fact the Plaintiff's own credit as were the Plaintiff's assets and the Plaintiff's ability to repay. The Defendant has merely appeared to monetise the Plaintiff's physical assets and has failed to lend to the Plaintiff any asset of the Defendant such as to constitute a legal consideration.

13..... The Plaintiff further says that the Defendant engaged in conduct which was misleading or deceptive or likely to mislead and deceive within the meaning of Section 52, 52A and 53 of the Trade Practices Act 1974 for the reason set out in Paragraph 4 thereof.

14..... In agreeing to make the loan to the Plaintiff as set out in Paragraph 3 hereof, the Defendant did not advise the Plaintiff that:

(a) What the Defendant was intending to provide to the Plaintiff was Bank Credit, not legal tender money of the Commonwealth of Australia;

(b) The provision of such Bank Credit would result in an increase in the deposits of the Australian Banking System;

(c) Such an increase in loans and deposits would inject into the Australian community only sufficient credits to constitute the principal amounts of any such loans and did not provide the means to repay either interest or charges;

(d) The repayment of all or any part of such credit destroyed the credit to the extent of such repayment;

(e) The only means by which the interest and charges could be serviced by the Plaintiff would be if other persons or corporation continued to obtain more similar credits from the Australian Banking system of which the Defendant forms a part such that additional funds were available to some borrowers;

(f) The contraction of credit by the Australian Banking system would result in an inability of borrowers generally and, the Plaintiff in particular, to service borrowings as to either interest or charges;

(g) An increase in interest rates by the Australian Banking system would result in the inability of borrowers generally and, the Plaintiff in particular, to service borrowings as to either interest or charges;

(h) Whilst the Defendant was proposing to provide the loan by way of Bank Credit, the Defendant would require repayment from the Plaintiff in legal tender money of the Commonwealth of Australia.

- Fair Trading Act (NSW) 1989, Sections 42, 43, 44.
- Contracts Review Act, Section 4
- Trade Practices Act 1974. Sections 52, 52A, 53.
- Industrial Arbitration Act 1940, Section 88F.

15..... The Plaintiff claims:-

(i) A Declaration that the Plaintiff is not contractually or otherwise required to repay to the Defendant in legal tender money of the Commonwealth of Australia or the Bank Credit created by the Defendant and credited to accounts with the Defendant in the name of the Plaintiff;

(ii) A Declaration that the following Mortgages granted by the Plaintiff to the Defendant are null and void: